STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK O. COUCH,

Defendant-Appellant.

UNPUBLISHED
October 14, 2003

No. 241079
Wayne Circuit Court
LC No. 01-007012-01

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(c), second-degree criminal sexual conduct, MCL 750.520c(1)(c), and impersonating a public utility worker, MCL 750.217b. He was sentenced to concurrent prison terms of fifty to seventy-five years for the first-degree CSC conviction, ten to fifteen years for the second-degree CSC conviction, and one to two years for the impersonating a utility worker conviction. He appeals as of right. We affirm.

I. Facts

This case arose from defendant's impersonating a public utility worker to gain entry into the home and bedroom of the seventeen-year-old complainant during which he performed fellatio on her. The complainant's twelve-year-old brother testified that on the occasion in question he was home from school on Easter break, and his parents were at work. At about 9:00 a.m., a man came to the door and asked if his sister was home and, upon receiving an affirmative answer, asked if he might come in "to check the electric, the circuit breaker." He was wearing a jacket that carried the name of a company and the emblem of a yellow lightening bolt. The man was carrying a clipboard. The man told the boy that he had visited the house before and met with the boy's parents. The complainant's brother identified defendant at a live police lineup as the man who came into his house.

The complainant testified that she was at home alone with two younger brothers and a younger cousin. Her brother awoke her to tell her that a man was at the house. The complainant, thinking the man to be a service person connected with the electric company, instructed her brother to allow the man into the house. She then went back to sleep. The complainant testified that her brother returned to ask whether the man could count the electrical outlets in her room, to which she responded that there were three and she went back to sleep.

The complainant's brother testified that he let the man into the house and he directed the man to the basement. The man returned from the basement and asked to inspect all the plugs in the house. He counted the plugs in the rooms of the house, including the upstairs rooms, except for the complainant's room. The man sat on the bathtub in the bathroom and started to work on the clipboard. The complainant's brother went downstairs. When he heard his sister screaming, he ran upstairs and saw the man's feet in his sister's bedroom by looking under the closed bedroom door. The boy ran downstairs, took the portable phone, ran to his neighbors and called the police. The boy identified defendant from a live lineup as being the perpetrator.

Meanwhile, the complainant testified that she was awakened by a man who covered her face with his hand, told her to be quiet, then opened her legs with his hand and got on the bed. The man pulled off her underwear, then started to lick "down there" and feeling her chest, elaborating that by "down there" she meant her vagina, and that by "chest" she meant "boobs." The complainant screamed, and the man struck her in the face. The complainant stated that because the man's face was veiled with a hood and a piece of lingerie, she was not able to identify him.

Defendant testified, insisting that he was elsewhere when the victim was assaulted, and thus a victim of mistaken identity. The jury found defendant not guilty of home invasion, but guilty of the other three crimes as charged.

II. Bad Acts Evidence

Defendant's first issue on appeal is that his conviction should be reversed because the trial court abused its discretion when it allowed two witnesses to testify about prior bad acts. We disagree.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." Evidence of prior bad acts is admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). A proper purpose is one other than establishing the defendant's character to show his or her propensity to commit the offense. *VanderVliet, supra* at 74.

In the first instance of prior bad acts, the prosecutor moved the trial court to admit evidence that defendant committed an assault some seventeen years earlier that did not result in criminal charges. The prosecutor offered the evidence to prove identity and plan on the ground

that, in both incidents, the victims were lying in their own beds when the offender came into their bedrooms without permission and with his face covered. Defense counsel objected on the ground that the offender in the current case entered the house by resort to pretenses, which was not alleged in the earlier incident. Defense counsel argued that because the earlier incident occurred so long ago, and because defendant never had to respond to any allegations at that time, mention of the incident would be seriously prejudicial. The court ruled that the proposed evidence was relevant "as a scheme, plan, or system of doing an act, and also perhaps on the issue of knowledge . . . and identity . . . ." The court further held that the probative value of the evidence outweighed its obvious potential for prejudice.

At trial, the witness testified that, one night in 1984, while she was asleep in her room at home, with no other adults in the house, defendant woke her up at 7:00 or 8:00 a.m. by touching her leg. Although defendant had one of her tank tops over his face, she told him that she recognized his voice, upon which he removed the tank top. Defendant then climbed onto her bed and pulled at her clothing, but she strenuously resisted him, and he left the house, telling her through the open dining room window that he was sorry.

We conclude that the trial court did not abuse its discretion in ruling that the dissimilarities between the two incidents were insignificant and that the combination of "[t]he article of clothing over the face, approaching the victim while she was asleep . . . in her bed, gaining access to the house in some unlawful way" constituted a "signature" sufficient to show defendant's identity, intent, scheme or system, and absence of mistake and was admissible for those reasons, particularly in light of defendant's alibi defense. We further note that both incidents took place in the morning daylight hours, at what was presumably near the start of the day for each victim. As our Supreme Court has stated in the sexual assault context, "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Defendant characterizes the similarities between the two incidents as "similar spontaneous acts," but we conclude that the court did not abuse its discretion in declining to share that view. In light of the stringency of the test for an abuse of discretion, *Rice*, *supra*, a court's decision on a close evidentiary question cannot ordinarily be so characterized. *Sabin*, *supra* at 67.

The next instance of a prior bad act in this case relates to a police officer's testimony concerning his off-duty observations of defendant about a month after the incident in question, which led to defendant's arrest. The record indicates that the trial court believed it ruled on the admissibility of the second prior bad act in this case, when it had not. The parties failed to correct the court when it subsequently asked whether it had ruled on the matter. Rather, the prosecutor misinformed the court that it already had. Because this issue was not determined by the trial court, our review is for plain error on the record affecting a substantial right. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The prosecutor offered the evidence to prove defendant's identity and his motive and scheme. At trial, the officer testified that, while he was riding his bicycle around his neighborhood one afternoon, he spotted a van moving unusually slow in the subdivision, and identified defendant as its driver. According to the officer, he understood his department to be looking for a van with similar distinct features. He knew that the driver of the van was a suspect

in a rape case, so he reported what he saw. The officer observed that the van headed into a dead end street where the high school was located and where there was a track meet going on at the high school at the time.

On appeal, defendant argues that he suffered prejudice from the testimony that he was seen at a high school track where "young girls" were running track and field. However, our review of the record indicates that the police officer said nothing of the nature of the activities taking place at the school or the gender of the persons involved in those activities. The officer only testified to his belief that defendant was driving suspiciously in the subdivision and that he headed into the dead end street leading to the high school. The record reveals that it was defendant himself who later testified to stopping at the school on his way home from work on the day in question and that he noticed several sports events taking place at the time, including "some females running on track doing some long jumps." Given the above, we find no error.

III. Character Witnesses

Defendant argues that the trial court erred in excluding from evidence the testimony of three character witnesses. We disagree.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *Bahoda*, *supra*. As this Court pointed out in *People v George*, 213 Mich App 632; 540 NW2d 487 (1995), a defendant has an absolute right under MRE 404(a)(1) to put evidence of his good character before the jury. *Id*. at 634, citing *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). The only proviso is that once a defendant opens the door to discussing his character, the prosecution may rebut this testimony and may inquire into specific instances of bad acts on cross-examination. *Id*. If a defendant offers evidence to show "a pertinent trait of character," the prosecutor may offer character evidence in rebuttal. Therefore, it is well-established that "'[o]nce a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed.'" *People v Johnson*, 409 Mich 552, 558; 297 NW2d 115 (1980). Thus, under MRE 405(a), a prosecutor may rebut defendant's character evidence "by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the bad reputation of the defendant." *Whitfield*, *supra* at 131.

After defendant testified at trial, he attempted to call three character witnesses to testify about his reputation for truth and honesty. The prosecutor objected, explaining that defense counsel had told her "off the record" of his intention to call "some preachers" as character witnesses but that defense counsel never submitted a witness list. Defense counsel, on the other hand, explained that the character witnesses had only recently come to his own attention. The trial court sustained the prosecutor's objection and the three witnesses were not allowed to testify on the ground that defendant's notice of character witnesses was untimely. We conclude that the court's remedy of excluding the testimony of the witnesses was not an abuse of discretion. The prosecutor's willingness before trial to see what the defense decided to bring was not a waiver of the right to object when witnesses who were never disclosed appeared at the last minute.

Further, the trial court correctly noted that calling the character witnesses would have opened the door for the prosecutor to cross-examine these witnesses about specific instances of

defendant's past conduct. MRE 405(a). We find no abuse of discretion in the court's ruling that the benefit from the testimony would be outweighed by the damage that may be caused on cross-examination where the prosecutor may elicit testimony about defendant's prior alleged misdeeds.

IV. The Effective Assistance of Counsel

Defendant asserts that he is entitled to a new trial because defense counsel's failure to list his character witnesses constituted ineffective assistance of counsel. We disagree.

Because defendant did not move below for a new trial or a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Proving the latter means showing that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

In this case, we have no reason to second-guess the trial court's assessment, when it informed defense counsel: "[I]t's not a question of your exercising inappropriate professional judgment. You obviously have tried to call them and you offered them and you got them here and they're ready to testify. You've done your part." We further agree with the court's conclusion that, had those witnesses been called, their testimony on cross-examination might have been more harmful than helpful to the defense. Defendant does not show how the testimony of the character witnesses would have made a difference in the outcome of the case. Accordingly, defendant's claim is without merit.

V. Sentencing

A. The First-Degree CSC Conviction

Defendant argues that he is entitled to resentencing on his first-degree CSC conviction because the sentencing court[2] excessively exceeded the sentencing guidelines for reasons that were not substantial and compelling and that were already taken into account in calculating the guidelines. We disagree.

This Court reviews for clear error the trial court's determination of the existence of a sentencing factor. *People v Babcock (Babcock III)*, 469 Mich 247, 264; 666 NW2d 231 (2003), quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review de novo the determination that the sentencing factor is objective and verifiable. *Babcock III*, *supra*. "Objective and verifiable" has been defined to mean that the facts to be considered by

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] Defendant was not sentenced by the trial judge.

the trial court must be actions or occurrences that are external to the minds of the judge, defendant, the prosecution, and others involved in the case, and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). We review for an abuse of discretion the determination that the objective and verifiable factor constitutes a substantial and compelling reason to depart from a mandated minimum sentence. *Babcock III, supra* at 264-265. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id*. at 274.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock III, supra* at 272. To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable, and must keenly or irresistibly hold the attention of the court. *Babcock III, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). A substantial and compelling reason "exists only in exceptional cases." *Babcock III, supra*, quoting *Fields, supra* at 68.

Defendant's minimum sentencing guidelines range was from fifty-one to eighty-five months for the first-degree CSC conviction. The sentencing court departed upwards and sentenced defendant to a minimum of fifty to seventy-five years (600–900 months). This constitutes a forty-three year upward departure from the sentencing guidelines. The court identified four factors upon which it grounded its decision to deviate from the sentencing guidelines for the conviction and recorded them on defendant's Sentencing Evaluation Report Departure Evaluation form, as follows:

> [1] The basic factual situation giving rise to [defendant's] conviction suggested that he had stalked the victim for a considerable period of time before invading the complainant's family home under the disguise of a public utility worker and committing the act in question. In doing so, he terrorized not only the direct victim but two of her younger brothers and then fled the scene in a fashion which drew the attention of a number of neighbors and passers-by. He not only terrorized the victim's home in an unusually sinister fashion but upset the entire neighborhood and community in doing so. The court feels that the basic facts of this crime are inadequately taken into account by the sentencing guidelines.
>
> [2] Additional factors would include the defendant having committed a very similar crime under very similar circumstances in 1984, the victim in that case having testified to her own trauma as a result of the Defendant's act. That together with the circumstances under which Defendant was apprehended (sitting in his van next to a [ ] High School field track) suggests that the Defendant is an extremely perverted and sinister individual.
>
> [3] Also, the Defendant has steadfastly maintained his innocence not only for the subject incident but for the prior incident which was put into evidence and persistently maintains that he is an ordained minister and committed to Christian religious principles and uses that as an explanation for why he did not commit the act in question. As a result, he has proven to the court that he is unredeemable and unrepentant and highly likely to continue in a pattern of criminal behavior, should his term of incarceration be within the guidelines.

> [4] Also, Defendant's use of his wife as an alibi witness giving testimony that was transparently false suggests his manipulative and unrepentant attitude.
>
> The court felt that none of the above factors were adequately taken into account by the sentencing guidelines which would have imposed a minimum sentence somewhere in the range of six to twelve years, if that, depending on scoring.

Defendant cites to the first factor articulated by the sentencing court and argues that the facts in this case were already taken into account in calculating the guidelines. The Legislature has clearly authorized sentencing judges to find that a reason already accounted for in the guidelines has been given inadequate or disproportionate weight, and therefore, is a substantial and compelling reason to depart from the recommended guidelines range. *People v Lowery*, ___ Mich App ___; ___ NW2d ___ (Docket No. 240001, 8/21/2003) slip op p 2; *People v Deline*, 254 Mich App 595, 598; 658 NW2d 164 (2002); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). We conclude that the court did not abuse its discretion by concluding that the totality of the circumstances in this case was not adequately incorporated into the guidelines and thus constituted substantial and compelling reasons to depart upward from the sentencing guidelines.

Defendant next points to the first and second factors and argues that there was no evidence whatsoever in this case that he "stalked" the complainant prior to the crime. We disagree. As previously discussed in this opinion, defendant's arrest occurred when an off-duty police officer who lived in the neighborhood observed defendant's van and recognized it as the vehicle wanted in connection with a rape. The prosecutor offered the evidence to prove identity, motive and scheme. The complainant testified that she was a member of the school's track team. Defendant himself testified that he stopped at the school and observed several activities taking place there, including young girls running track. A factfinder may reasonably infer that defendant's scheme and plan in committing his crimes was to stalk a victim, and follow her to her home from school to learn where she lived. The fact that defendant was at the school that day, observing the activities, is objective and verifiable. Not only did the police officer testify to observing defendant enter into the dead end street that led to the high school, but defendant also testified to the fact and he also pointed to another person who may verify the information – defendant testified that a coach for one of the activities questioned him that day.

Defendant next cites to the third factor articulated by the sentencing court and argues that the court improperly based its decision to depart from the sentencing guidelines on defendant's "refusal to admit guilt" We disagree. It is proper for a trial court to consider a defendant's refusal to express remorse when imposing sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Calabro*, 166 Mich App 389, 396; 419 NW2d 791 (1988). As our Supreme Court explained in *People v Wesley*, 428 Mich 708, 712-713; 411 NW2d 159 (1987):

> A trial court's decision as to the proper sentence must be based upon the particular circumstances of each case and dependant upon material facts. Such factors include: (1) the potential for the reformation of the offender, (2) the protection of society, (3) the discipline of the wrongdoer, and (4) the deterrence of others from committing like offenses.

If the record shows "that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *Wesley, supra* at 713. Here, the language of the third factor indicates that the court was addressing "the remorsefulness as it bore upon defendant's rehabilitation." The court thoroughly explained the reasons for its conclusion that defendant was "unredeemable and unrepentant" and its belief that defendant would resume his pattern of criminal behavior upon his release from prison. A sentencing court is not prohibited from explaining what the substantial and compelling reasons for a departure may suggest or mean in a certain case. See *Babcock III, supra* at 260 n 14. We conclude that the court was properly providing its explanation to justify the sentence departure.

In support of his argument that the sentencing court improperly considered his "refusal to admit guilt," defendant also cites to the sentencing transcript where the court stated:

> [*THE COURT*]: I have to take into account the defendant's steadfast denials of responsibility in this to even here on the afternoon when he's allowed time for speaking to the Court on the day of sentencing, the entire content of his remarks was to once again steadfastly deny his criminal responsibility in this case. He also did that with respect to the 1984 case.

We disagree with defendant's assertion that the above comments indicate the sentencing court's belief that defendant could not be rehabilitated because defendant *failed to admit his guilt* for the current crime and the uncharged 1984 crime. Placed in context in the sentencing transcript, it is clear that the court was focusing on defendant's lack of remorse and how it bore on his rehabilitation.

We are satisfied that the factors articulated by the sentencing court are objective and verifiable. Mindful of the fact that a substantial and compelling reason "exists only in exceptional cases" and must irresistibly hold our attention, *Babcock III, supra* at 257, we conclude these factors constitute substantial and compelling reasons to justify the departure in this case.

Defendant next argues that the forty-three year sentence departure was stiffly disproportionate and asserts that the CSC crime in this case was not any more "heinous" than other instances of CSC and he asserts that the sentencing court imposed a minimum fifty-year sentence "essentially for no reason at all, other than to feed [the sentencing court's] anger."

From our review of the sentencing transcript, we see nothing whatsoever to indicate that the sentencing court was angry or biased. In addition, defendant's reliance on the *Milbourn*[3] test for proportionality test is misplaced. The *Milbourn* test is no longer used by this Court. *Babcock III, supra* at 254-256. Proportionality is determined by whether the sentence is proportionate to the seriousness of defendant's conduct and to the seriousness of his criminal history. *Id.* at 262-263, 273.

[3] *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Having determined that the sentencing court articulated substantial and compelling reasons to justify the departure, we conclude that the sentence is proportionate to the seriousness of defendant's conduct and to the seriousness of his criminal history. Defendant violated the sanctity of an innocent family's home and extinguished the sense of security a family was entitled to have in its place of refuge. As indicated by the sentencing court at sentencing and in the departure evaluation report, the circumstantial and direct evidence in this case establishes that defendant stalked his victim, was aware of the Easter school break in that particular school district and monitored the victim's home on the morning of the crime. Once the victim's parents left for work, he unlawfully gained entry into the home under the guise of a public utility worker. He attacked a teenager who was asleep in her bedroom and proceeded to perform fellatio on her while her younger brothers and cousin listened helplessly to her scream. Defendant's conduct was not restricted to the immediate victims, but reverberated throughout the entire community, as exemplified in the media attention the crime received. The court sufficiently articulated the substantial and compelling reasons for the departure and sufficiently explained why those factors justified the departure in this case. It is clear from the record that, in rendering the sentence, the court considered the four *Wesley* factors. We conclude that the court did not abuse its discretion in determining that the substantial and compelling reasons justified this particular departure.

B. Second-Degree CSC Conviction

Defendant challenges his sentence for second-degree CSC on the ground that the sentencing court did not prepare a sentencing information report (SIR) for that offense. However, as defendant acknowledges in his brief on appeal, the legislative guidelines were amended, effective October 1, 2000, to require scoring of a sentencing grid for "each conviction for which a *consecutive* sentence is authorized or required . . . ." MCL 771.14(2)(e)(i) (emphasis added). The obvious purpose of the amendment, to use defendant's words, was "to eliminate a multiplicity of SIRs where there was more than one conviction and the reports were redundant."

Because all three of defendant's sentences must run concurrently, and not consecutively, the sentencing court properly provided an SIR for first-degree CSC only, the offense with the highest crime class. Defendant's speculation concerning what an SIR for second-degree CSC would have produced is thus unavailing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot